

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OPPENHEIMER & CO. INC.,

Plaintiff,

v.

STEVEN MITCHELL, DORI  
MITCHELL, JEROME HOPPER, and  
LORI HOPPER,

Defendants.

CASE NO. C23-67 MJP

ORDER GRANTING MOTION  
FOR PROTECTIVE ORDER

This matter comes before the Court on Plaintiff's Motion for Protective Order. (Dkt. No. 59.) Having reviewed the Motion, Defendants' Opposition (Dkt. No. 61), the Reply (Dkt. No. 63), and all supporting materials, the Court GRANTS the Motion.

**BACKGROUND**

Plaintiff Oppenheimer & Co., Inc. filed this declaratory judgment action to avoid having to arbitrate claims that the four Defendants assert against it in a Financial Industry Regulatory Authority (FINRA) arbitration. (See Complaint ¶ 67 (Dkt. No. 1).) Oppenheimer is a member of

1 FINRA, which is “a non-governmental, self-regulatory agency that has the authority to exercise  
2 comprehensive oversight over all securities firms that do business with the public.” See  
3 Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 737 (9th Cir. 2014). Defendants  
4 commenced the arbitration to recover funds they invested and lost in a private equity fund called  
5 Horizon Private Equity III LLC (“Horizon”) that an Oppenheimer-registered broker, John  
6 Woods, allegedly created and operated that was a Ponzi scheme.

7 Oppenheimer obtained a preliminary injunction barring Defendants from pursuing claims  
8 in the FINRA arbitration set to commence on March 20, 2023. (Order Granting Motion for  
9 Preliminary Injunction (Dkt. No. 49).) In granting the preliminary injunction, the Court noted  
10 that the primary question in this action is whether Defendants were Oppenheimer’s “customers,”  
11 as FINRA Rule 12200 defines that term. Although the FINRA rule defines “customer” with great  
12 breadth, the Ninth Circuit has narrowed its reach to include only those who “purchase[]  
13 commodities or services from a FINRA member [or associated person of the FINRA member] in  
14 the course of the member’s FINRA-regulated business activities, i.e., the member’s investment  
15 banking and securities business activities.” FINRA Rule 12200, Reno, 747 F.3d at 741.

16 Defendants seek discovery in the form of depositions of two former Oppenheimer  
17 employees. Oppenheimer filed the Motion for Protective Order to limit the discovery.  
18 Specifically, Oppenheimer seeks an order preventing Defendants from taking discovery “on  
19 matters irrelevant to the claims and defenses of the parties to this civil action, including matters  
20 related solely to the merits of claims Defendants may later assert against Oppenheimer.”  
21 (Proposed Order at 1 (Dkt. No. 59-1).) Defendants argue in opposition that they are “seeking  
22 discovery from nonparties in order to prove that they were customers of Oppenheimer.” (Opp. at  
23 9 (Dkt. No. 61).) This largely tracks what Oppenheimer believes to be the scope of discovery:  
24

1 “whether there is any arbitration agreement between Oppenheimer and any Defendant or whether  
 2 Defendants are or ever were customers of Oppenheimer.” (Mot. at 8 (Dkt. No. 59).) Defendants  
 3 confirm that they do not seek discovery on the merits of their claims, stating in opposition that  
 4 they are only “seeking discovery from nonparties in order to prove that they were customers of  
 5 Oppenheimer.” (Opp. at 9.) But Defendants wish to ask witnesses about this action and three  
 6 other declaratory actions Oppenheimer has commenced against other individuals who have  
 7 commenced FINRA arbitrations against it. Those actions are: (1) Oppenheimer & Co. Inc. v.  
 8 Ginn, No. 2:23-cv-02994-ODW-SK (C.D. Cal.); (3) Oppenheimer & Co. Inc. v. Covington, No.  
 9 1:23-cv-00280-TDS-JEP (M.D.N.C.); and (3) Oppenheimer & Co., Inc. v. Sylvia Majani, Case  
 10 No. 6:23-00113-CEM-EJK. Prior to filing its Reply brief, Oppenheimer proposed to allow  
 11 Defendants to examine the witnesses on these same issues as to the defendants in the other three  
 12 actions. (See Ex. A to the Supplemental Declaration of Matthew C. McDonough (Dkt. No. 64).)  
 13 But the Parties were unable to reach agreement.

#### 14 ANALYSIS

15 Rule 26(c) allows a party to seek an “an order to protect a party or person from  
 16 annoyance, embarrassment, oppression, or undue burden or expense[.]” Fed. R. Civ. P. 26(c)(1).  
 17 The moving party must meet and confer prior to moving for relief and show “good cause” exists  
 18 to grant the relief. “For good cause to exist, the party seeking protection bears the burden of  
 19 showing specific prejudice or harm will result if no protective order is granted.” Phillips ex rel.  
 20 Ests. of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210–11 (9th Cir. 2002).

21 The Court agrees with Oppenheimer that a protective order in this action should issue  
 22 given the narrow reach of this declaratory action. Discovery into the merits of Defendants’  
 23 claims against Oppenheimer are not relevant. On this point, the Parties largely agree. Discovery  
 24

1 in this action must focus solely on whether Defendants were “customers” of Oppenheimer, as the  
2 term is defined in FINRA Rule 12200 and as narrowed by the Ninth Circuit. See Reno, 747 F.3d  
3 at 741. This is the critical issue to whether Defendants may compel arbitration or not. Discovery  
4 may not be conducted into the merits of Defendants’ underlying claims against Oppenheimer.  
5 However, Oppenheimer has agreed to allow Defendants ask the witnesses deposed in this action  
6 about whether the defendants in the other three declaratory actions Oppenheimer has commenced  
7 are “customers” under FINRA Rule 12200. The Court finds this proposal reasonable.

8 In order to ensure the discovery in this action remains properly focused on the dispositive  
9 question and to help create efficiencies across all four actions the Parties have identified, the  
10 Court GRANTS the Motion. Discovery in this action shall be limited to answering the question  
11 of whether Defendants were “customers” of Oppenheimer, as FINRA Rule 12200 and the Ninth  
12 Circuit have defined the term “customer.” See Reno, 747 F.3d at 741. During depositions noted  
13 in this action, Defendants may inquire into whether the defendants named in the other three  
14 actions Oppenheimer has filed are “customers” of Oppenheimer. Otherwise, the Parties may not  
15 conduct discovery on matters related solely to the merits of the claims Defendants (or the  
16 defendants in the other three actions) may later assert against Oppenheimer in a judicial forum or  
17 arbitration.

### 18 CONCLUSION

19 The Court GRANTS the Motion for Protective Order. Discovery in this action shall be  
20 limited to answering the question of whether Defendants in this action and the defendants in the  
21 other three actions Oppenheimer has commenced are “customers” of Oppenheimer, as FINRA  
22 Rule 12200 and the Ninth Circuit have defined the term “customer.” See Reno, 747 F.3d at 741.  
23 The Parties may not conduct discovery on matters related solely to the merits of the claims  
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1 Defendants (or the defendants in the other three actions) may later assert against Oppenheimer in  
2 a judicial forum or arbitration.

3 The clerk is ordered to provide copies of this order to all counsel.

4 Dated July 25, 2023.

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6 Marsha J. Pechman  
7 United States Senior District Judge  
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